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IN THE

SUPREME COURT OF THE UNITED STATES

PAUL TALCOTT CURRIER,
COMMUNICATION BRIDGE GLOBAL, INC.

Petitioner,

vs.

ROBERT CHOW,

Respondent.

On Petition for Writ of Certiorari to the First District California Court of Appeals, Div. Five

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a court refuses to grant equitable relief from default to a corporation that never received its day in court, due to oppressive malicious prosecution and fraud, are the Due Process Clauses of the Fifth and Fourteenth Amendments violated?

2. Is a corporation entitled to equitable relief from a judgment obtained by plaintiffs who: (a) fraudulently converted that corporation's assets under color of state law; (b) caused the corporation to become insolvent; and © then took default judgment against that corporation, which could not defend itself from the suit because it had no funds to hire an attorney?

3. When a corporation's two successive attorneys' gross malpractice and repeated positive misconduct cause a default judgment to be entered against their client corporation, and that corporation, then insolvent, cannot afford a third attorney, is it appropriate to grant the corporation equitable relief, when the corporation applies for relief from default immediately after obtaining new legal counsel?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The petitioner has no parent, and there are no publicly held companies that hold any stock of the petitioner.

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CITATIONS TO OPINIONS AND ORDERS ENTERED IN THE INSTANT CASE

This case was San Francisco Superior Court Case No. CGC-01-323394, California Court of Appeals, First District, Division Five, Case No. A110455, and also California Supreme Court Case No. S142537. All opinions and orders in this case were not published.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT

The order sought to be reviewed is that of the California Court of Appeals, First District, Division Five, which was entered on February 28, 2006[1]. Petitioner CBG filed a petition for writ of certiorari with the California Supreme Court on April 10, 2006, and the California Supreme Court's order denying certiorari was issued on May 24, 2006.

On August 18, 2006, Justice Kennedy of this Court issued an extension of time, up to and including October 6, 2006, to file the petition for writ of certiorari in this action[2].

The statutory provision that allows this Court to review the decision of the California Court of Appeal after the denial of CBG's petition for writ of certiorari is 28 U.S.C. §1257(a).

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[1] Appendix Vol I., at 23a - 27a.

[2] Appendix Vol. I, at 29a .

CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER LAW INVOLVED IN THIS APPEAL.

The provisions of the U.S. Constitution involved in this appeal are the First, Fourth, Fifth, and Fourteenth Amendments.

This case also involves a review of the common-law rule against corporate self-representation, that is, representation of corporations in court by any corporate employee, agent, officer, shareholder, or director who is not a licensed attorney.

STATEMENT OF THE CASE

Respondent Robert Chow ("Chow") wrongfully converted (i.e. stole) the assets of Petitioner Communication Bridge Global ("CBG") when he fraudulently obtained a restraining orde. "Chow's restraining order" or "the restraining order") against Paul Talcott Currier ("Currier"), the CEO and only human agent of CBG.

Chow' obtained the restraining order in San Francisco Superior Court Case No. CGC-01-323391, *Communication Bridge USA, Inc. v. Paul Talcott Currier, Communications Bridge Global, Inc.*, et al., ("*CBUSA v. Currier & CBG*") Chow's restraining order forced Currier onto the street. In *CBUSA v. Currier & CBG*, Chow falsely alleged that Currier was trespassing in CBUSA's corporate offices after allegedly having been removed from Currier's position as Chief Executive Officer of CBUSA. Chow's aforementioned allegations were false for two reasons: (1) the

election in which Currier was purportedly removed as CEO of CBUSA had been rigged by Chow with forged proxies and was fraudulent; and (2) the offices used by CBUSA were also leased by Currier and several corporations Chow about which Chow omitted to inform the Court. Those offices were in fact, also the home of Currier and several other corporations run by Currier, including CBG.

The emergency *ex parte* restraining order was executed by the San Francisco Sheriff's Department and forced Currier onto the street without hearing, with no possessions other than the clothing on his back. Chow's personal attorneys, Michael Fish ("Fish"), Thomas Mauriello ("Mauriello"), and Philip Snell ("Snell"), seized all property which belonged to CBUSA, CBG, Currier, and Currier's corporations, regardless of the fact that the restraining order allowed Chow to seize the property of CBUSA only. The property and legal records of Currier's other corporations were never returned to him. Chow then filed a false bankruptcy on behalf of CBUSA. Chow and his agents then stripped CBUSA's offices of all Currier's, CBUSA's, and CBG's property, in violation of the Bankruptcy Code, since CBUSA's assets were assets of the U.S. Bankruptcy Trustee assigned to the case[3].

Currier had retained attorney Vincent Spohn ("Spohn"), both as his personal counsel an as counsel for CBUSA and CBG. Spohn not only refused to assist Currier in the legal defense of CBG, but assisted Chow in the execution of the

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[3]Bankr. N.D. Cal. Case No. 01-32161 DM.

fraudulent election and assisted Fish and Snell in the preparation of both underlying cases: (1) *CBUSA v. Currier & CBG* (S.F. Sup. Ct. Case no. 01-323391) and (2) *Chow v. Currier & CBG* (S.F. Sup. Ct. No. 01-323394). Spohn also later testified against Currier at trial in *Chow v. Currier & CBG*.

When Currier became aware that his first counsel, Vincent Spohn, would not assist him, but instead and in fact was working against his and CBG's interests, he immediately sought another, second, attorney to represent both himself and CBG. Despite his indigency, Currier borrowed money from his mother to retain the services of Ricardo C. Saria ("Saria") of Palo Alto, California. Currier retained Saria's services at the end of October of 2001.

Saria agreed to represent Currier and CBG in *Chow v. Currier & CBG*. Saria appeared only two or three times. In *Chow v. Currier & CBG*, Saria did absolutely nothing to protect Currier's or CBG's interests. Saria failed to make any appearance on behalf of CBG. Saria allowed default judgments to be entered against Currier and CBG. Saria also failed to follow the instructions given to him in an order on a motion to strike in *Chow v. Currier & CBG*, which resulted in Currier's cross-complaint against Chow being stricken from the underlying case. The striking of Currier's cross-complaint also damaged Currier, CBG's, and CBUSA's later federal action against Chow and others. Saria later withdrew from the representation of Currier, and implicitly, CBG, on whose behalf Saria never appeared! In a written admission of negligence and malpractice,

Saria later moved for relief from the default judgment on Currier's behalf, yet he did not do so on behalf of CBG. The default judgment remained intact as against CBG[4].

Currier, then indigent, had to defend himself at trial in *Chow v. Currier & CBG*. *CBUSA v. Currier & CBG* was stayed in September of 2001 due to the false bankruptcy of CBUSA by Plaintiff in that sister case. At trial, acting as his own lawyer, Currier prevailed without presenting a defense; he essentially won a motion for nonsuit on cross-examination alone. The trial judge, Judge Ernest Goldsmith of the San Francisco Superior Court, wrote, in the *Statement of Decision* following trial, that

> Chow's testimony that he would not have joined Currier in this venture does not ring true. The Court finds that the blame fixed on defendant Currier's nondisclosure by Plaintiff is a revisionist theory concocted by Chow. The court further finds that Chow's causes of action based on nondisclosure have no substance or merit whatsoever.[5]

By the time the *Statement of Decision* was issued by Judge Goldsmith, CBG had obtained legal counsel and had filed a federal lawsuit against Chow and others in reference to federal RICO and

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[4]Appendix Vol. I, 1a-3a, 28a.

[5]Appendix Vol I, 17a-18a.

antitrust claims[6]. An appeal in that case is now pending before the Ninth Circuit[7].

In early 2005, CBG filed motions for relief from default judgment in both *Chow v. Currier & CBG* ("323394") and its sister case, *CBUSA v. Currier & CBG* ("323391"). The allegations and causes of action in the complaints in both *Chow v. Currier & CBG* and *CBUSA v. Currier & CBG* were virtually identical, and are identical for the purposes of this petition. Both motions were based on the following arguments:

- Currier had thoroughly prevailed at trial in *Chow v. Currier & CBG*, and since Currier was the only human agent of CBG, CBG could not have committed any torts of breaches of contract unless Currier committed them. Therefore, a default judgment against CBG is logically inconsistent with Currier's complete exoneration at trial in the same case, and should be vacated.

- The wrongdoing of Chow caused CBG to be unable to defend itself in court and avoid a default judgment.

- CBG's corporate counsel, Vincent Spohn, corruptly sold out both Currier's and CBG's interests to Chow when he conspired with Chow to convert Currier's, CBG's, and CBUSA's assets through a fraudulent shareholder election, false bankruptcy, and malicious court prosecutions.

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[6]N.D. Cal. Case No. 04-3300 SI.

[7]Case No. 06-15390.

Spohn helped Chow execute the plan set forth in conspiracy.

The motions for relief from judgment also cited to this Court's decision in *U.S. v. Throckmorton*, which is widely cited as a seminal case setting forth the standards for equitable relief from default judgment[8]. All California and federal courts have adopted the *Throckmorton* standard[9]. CBG raised this federal due process issue at the trial court, and pressed on with it in the California Court of Appeal and its petition to the California Supreme Court[10].

The reason CBG has pressed forward with its attempts to vacate the $350,000.00[11] judgment against it, is that Currier and his shareholders, and the other director of CBG, Ordell Conrad, cannot use CBG as a mere disposable "shell" for doing business and limiting liability. CBG owns the rights to important telecommunications technology that was cross-licensed with CBUSA. As it stands, CBG cannot patent sell or license the technology without repossession of CBG's converted patent journals (i.e. patent journals seized by Chow), vindication, and relief from an

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[8] *U.S. v. Throckmorton* (1878) 98 U.S. 61, 66. California courts have adopted the *Throckmorton* rule for equitable relief from judgment.

[9] See, e.g., *In re Rachel M.* (2004) 113 Cal.App.4th 1289, 1297, rehearing denied and review denied, citing *Throckmorton* and *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471 [California Supreme Court case that applied *Throckmorton* standard].

[10] Appendix Vol I, 34a; Vol II, 57a.

[11] Appendix Vol. I, 3a.

unjust and erroneous default, which the trial court's law and motion department refused to vacate. Furthermore, no venture capitalists will invest in a corporation with such a large judgment against it and with virtually no physical assets with which to satisfy the judgment. CBG's material asset is intellectual property seized by Chow and major telecommunication companies.

Both CBG motions for relief from judgment were heard on May 10 and May 11, 2005, respectively. While Judge Warren of the San Francisco Superior Court granted the motion CBG filed in *CBUSA v. Currier & CBG*, Judge Quidachay of the same court denied CBG's motion in *Chow v. Currier & CBG*. Judge Quidachay's order was based on the grounds that corporate liability and individual liability are different, and the fact that Currier prevailed at trial did not mean that CBG would also prevail at trial.

On appeal to the First District Court of Appeal, CBG set forth the same arguments listed above, and added the fact that both Spohn and Saria had similarly completely failed to represent their client CBG.

CBG also presented evidence that the California Supreme Court had ordered the State Bar to investigate the claims Currier had made against Spohn in his accusation against Spohn filed with the California Supreme Court. Currier filed the accusation against Spohn after the California State Bar refused to investigate Currier's multiple written complaints of Spohn's wrongdoing. The California Supreme Court-ordered State Bar

investigation of Spohn's actions is still pending as of the date of this writing[12].

The California Court of Appeal upheld Judge Quidachay's ruling on the grounds that CBG had not met the requirements for equitable relief from a default judgment because of a failure to demonstrate: (1) a meritorious case; (2) "a satisfactory excuse for not presenting a defense to the original action"; and (3) "diligence in seeking to set aside the default once discovered[13]."

When it found CBG had not demonstrated a meritorious case, the Court of Appeal noted that CBG failed to provide "an analysis of the causes of action that were alleged, the causes of action that were tried, the relationship between Currier and CBG, and possibly, issues of res judicata and collateral estoppel. CBG has not even attempted to analyze those issues."

The Court of Appeal assumed that CBG met the second factor because it did not have the funds necessary to defend the lawsuit. However, the Court of Appeal found :

> The third factor, diligence, is clearly lacking. The record indicates the judgment at issue was entered in February 2003 and that CBG waited more than two years to file its motion to vacate. CBG does not suggest that it was somehow unaware of the judgment; the only

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[12]See the California Supreme Court order remanding Currier's accusation to California State Bar, Appendix, Vol. II, 94a .

[13]Appendix, Vol. I, 27a.

excuse it provides for failing to file a motion earlier is that it lacked the funds to do so. However, CBG admits that its interests were aligned with Currier, and Currier filed a motion to set aside the judgment less than two months after it was entered[14].

The Court of Appeal also noted that:
CBG has not cited any case that holds a judgment may be set aside on the grounds of 'economic oppression' and it would be difficult to characterize 'economic oppression' as either 'fraud' or 'mistake' as those terms are commonly understood. However, we need not base our decision on this ground[15]...

CBG petitioned the California Supreme Court for a writ of certiorari to review the Court of Appeal decision, but the petition was denied on May 24, 2006.

REASONS TO GRANT THE PETITION

I. This Case Involves Important Issues of Corporate Constitutional Rights under the First, Fourth, Fifth, and Fourteenth Amendments.

The issue of whether an insolvent corporate defendant against whom a default has been taken by the parties that made it insolvent, should be granted relief from judgment based on the

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[14]Appendix Vol. I., 28a.

[15]Appendix, Vol I., 26a-28a.

corporation's inability to afford an attorney is appears to be one of first instance. CBG was unable to find any case law that addresses this issue.

A. The Fifth and Fourteenth Amendments Both Guarantee "Due Process of Law" to Corporations; Thus Equitable Relief From Judgment is Due Where a Corporation Was Denied its Due Process Rights.

The Fifth and Fourteenth Amendments both guarantee "due process of law" to all persons, natural or corporate, facing a trial in U.S. state or federal courts[16]. As this Court succinctly stated : "A fair trial in a fair tribunal is a basic

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[16]It is long-established law that corporations have Fourteenth Amendment right, just as natural persons do. See, for example,"Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as natural persons." *Louis K. Liggett Co. v. Lee* (1933) 288 U.S. 517, 536. Similarly, corporations have First Amendment rights, as this Court held in *Central Hudson Gas & Electric Corporation, Appellant, v. Public Service Commission of New York* (1980) 447 U.S. 557. That a plaintiff is a corporation has no bearing on its standing to assert violations of the First Amendment and Fourteenth Amendment under 42 USC §1983 - *RK Ventures, Inc. v. City of Seattle* (9th Cir. 2002) 307 F.3d 1045; A corporation is a "person" within the meaning of the Fourteenth Amendment. *Metropolitan Life Ins. Co. v. Ward* (1985) 470 U.S. 869, 105 S.Ct. 1676, rehearing denied 471 U.S. 1120, 105 S.Ct. 2370, on remand *Ex Parte Ward*, 479 So.2d 41. Corporations also have rights under the Fourth and Fifth Amendments; see, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) [corporations have Fourth Amendment rights against warrantless search and seizure]; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 566-567 (1977) [corporation has Fifth Amendment right against double jeopardy]

requirement of due process[17]." The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases[18]. It is obvious that a corporation's being asked to perform the impossible - pay money it does not have and cannot get to hire an attorney - as a prerequisite to its appearance in court effectively denies the corporation any sort of trial before any sort of tribunal, fair or otherwise[19].

It also flies in the face of the decision of this Court in *Sniadach v. Family Finance Corp.*[20], in which this Court ruled that an alleged debtor's wages cannot be garnished to satisfy a claimed debt without either a prior hearing to determine the legitimacy of the debt or an extraordinary emergency, since it effectively denies corporations' in CBG's position any review of the legitimacy of the claims, ever. This also violates the federal and California policies favoring the adjudication of cases on their merits[21].

As such, this Court should review this case. It has been the long-standing rule to prohibit corporations from appearing in court through

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[17] *In re Murchison* (1955) 349 U.S. 133, 136, 75 S.Ct. 623, 625; see also *Bracy v. Gramley* (1997) 520 U.S. 899, 908-09, 117 S.Ct. 1793.

[18] *U.S. v. Nickl* (10th Cir. 2005) 427 F.3d 1286.

[19] This is noted in *In re Holliday's Tax Services, Inc.*, infra.

[20] (1969) 395 U.S. 337, 338-339, 342, 89 S.Ct. 1820.

[21] *Girard v. Monrovia School Dist.* (1953) 121 Cal.App.2d 737, 740; *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 695-699 (9th Cir. 2001).

anyone but a licensed attorney[22]. Some courts have recognized that a corporation can represent itself in court can "represent itself" through a non-attorney officer in court when the effect of barring such representation would effectively bar the corporation from the courts.

For example, in a case similar to this one, "[A] sole shareholder was permitted to represent his corporation in bankruptcy, because '[t]o require [the] corporation to appear by a lawyer is effectively to exclude it and its shareholder from the courts[23]."

However, this Court and the vast majority of the federal Circuit Courts of Appeals have rejected that reasoning and upheld the rule that a corporation must be represented by licensed counsel[24].

This legal impediment to a corporation's ability to defend itself from the actions of its own disloyal and treacherous officers, shareholders, or agents who cause a corporation to lose its assets (because the officers stole them), or from other persons who can wrongfully impoverish a corporation. As it

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[22] *Rowland v. California Men's Colony* (1993) 506 U.S. 194, 201 - 202, 113 S.Ct. 716, 721.

[23] *Fraass Survival Systems, Inc. v. Absentee Shawnee Economic Development Authority* (S.D.N.Y. 1993) 817 F.Supp. 7, 10 - citing *In re Holliday's Tax Services, Inc.* 417 F.Supp. 182, 183, affirmed w/o opinion 614 F.2d 1287 (2nd Cir. 1979).

[24] *Rowland*, supra, at 506 U.S. 202, n. 5, 113 S.Ct. 716, 721; see also *Lady Kelly, Inc. v. U.S. Sec'y of Agr.* 414 F.Supp.2d 1298, 1299, fn. 1. (CIT 2006).

stands, disloyal officers, shareholders or agents, or other miscreants can then sue the corporation at the end of their wrongdoing knowing that the corporation will not be able to defend itself. That creates an effective deterrent to the corporation's pursuit of further legal action, or operating as a business, in the future, and flies in the face of the equitable maxim " No one can take advantage of his own wrong[25]."

Since the rule against corporate self-representation is an effective "brick wall" that keeps an indigent corporate litigant out of court, it should be a sufficient legal excuse for the failure to present a defense. A corporation should be able to obtain relief from a judgment can show, in good faith, that it was financially unable to hire licensed legal representation the lawsuit before a default, but then later obtains funds to hire an attorney.

B. The Courts' Denial of Relief from Default Denied CBG its First Amendment Petition Rights

It is clear from many of this Court's decisions that the First Amendment's Petition clause provides protection to the right to petition for the redress of grievances, including by filing actions in the courts. As this Court stated in *BE & K CONSTRUCTION COMPANY v. NLRB*[26]:

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[25] California Civil Code §3517.

[26] (2002) 536 U.S. 516, 524-525.

> The First Amendment provides, in relevant part, that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights[27]," and have explained that the right is implied by "[t]he very idea of a government, republican in form[28]."

As such, this Court should review this case. It has been the long-standing rule to prohibit corporations from appearing in court through anyone but a licensed attorney[29]. Unfortunately, that prohibits indigent corporations from filing lawsuits to protect their rights, such as the current litigation between CBG, Chow, and others, which CBG could not have prosecuted without legal representation.

C. This Case Presents a Corporate Fourth Amendment Rights Issue.

As noted in the Statement of the Case above, this litigation began when Chow and his attorneys obtained a fraudulent EPO in *CBUSA v. Currier & CBG*, which caused the San Francisco Sheriff's Department to remove Currier from his home and the offices of CBUSA, CBG, and Currier's other corporations, so as to seize the possessions of

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[27] *Mine Workers v. Illinois Bar Assn.* (1967) 389 U. S. 217, 222

[28] *United States v. Cruikshank*, (1876) 92 U. S. 542, 552.

[29] *Rowland v. California Men's Colony* (1993) 506 U.S. 194, 201 - 202, 113 S.Ct. 716, 721.

Currier and his corporations, and to allow Chow to ensure, by seizing all of Currier's, CBG's, and CBUSA's assets, that Currier would not be able to pay for any legal defense personally, for CBG, and for CBUSA or his other corporations.

In *Soldal v. Cook County*[30], where this Court found a Fourth Amendment claim arose where sheriff's deputies seized a person's mobile home by removing it from foundation and towing it away upon request of the mobile home park's owner even though the sheriff's deputies knew the owner had no valid eviction order. Imagine if Mr. Soldal were indigent and was told he could not contest those wrongful acts until he paid for an attorney! Any appeals court in the country would clearly find grounds for equitable relief from a judgment entered against Mr. Soldal in those circumstances. That is the case here.

II. There is a Split of Authority Between the Sixth Circuit and the Fourth and Ninth Circuit as to What Constitutes Judgment-Nullifying Fraud.

This Court's ruling in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*[31], made it clear that fraud that affects more than a single litigant and which subverts, or attempts to subvert, the judicial process is fraud that vitiates a judgment. Such a judgment can and should be vacated by the courts

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[30](1992) 506 U.S. 56, 71, 113 S.Ct. 538, 549.

[31](1944) 322 U.S. 238, 246, 251, 64 S.Ct. 997.

at any time, even many years after the judgment is entered[32].

As noted in *Moore's Federal Practice*[33] there is a split of authority between Sixth Circuit and the Fourth and Ninth Circuit's definition of fraud on court - Sixth Circuit's definition requires the presence of five factors:

> (1) conduct on the part of an officer of the court; (2) that is directed at the "judicial machinery" itself; (3) that is intentionally false, willfully blind to the truth, or is in reckless disregard [of[34]] truth or falsity; (4) that is a positive averment or is a concealment when one is under a duty to disclose; and (5) that deceives the court. Thus, misconduct of an officer of the court is an essential element of fraud on the court; but there is fraud on the court only if this misconduct precludes proper adjudication by the court[35].

The Ninth Circuit states only that such fraud must be "a species of fraud which does or attempts to, defile the court itself *or* is a fraud perpetrated by officers of the court" [Emphasis added][36]. The

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[32] *Id*, at 245 - 246.

[33] 12 *Moore's Fed. Practice* (3d Ed., 2006 update), RELIEF FROM JUDGMENT OR ORDER, at §60.21[4][b], p. 60-54.

[34] This word is published as "or" in *Moore's* and appears to be a typographical error.

[35] *Id.*, citing *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993).

[36] *Id.*, citing *In re Intermagnetics America, Inc.* 926 F.2d 912, 916 - 917 (9th Cir. 1991).

Fourth Circuit's definition is identical to that of the Ninth Circuit[37].

Thus, the Sixth Circuit definition conflicts with the Fourth and Ninth Circuits. The Sixth Circuit requires that fraud that invalidates a judgment be committed by an officer of the court, whereas the Fourth and Ninth Circuit's definition includes any fraud that would "defile" the court. Furthermore, the Sixth Circuit states that, to vitiate a judgment, the fraud must actually deceive the court, whereas the Fourth and Ninth Circuits both count *attempted* fraud as fraud that possibly requires the resulting judgments to be vacated. Perhaps the Fourth and Ninth Circuits are simply following this Court's holding in *Murchison*, which states that even the appearance of impropriety or partiality in a judicial proceeding is grounds for relief from judgment[38].

In any event, this case is an opportunity for this Court to resolve the apparent split of authority among the federal Circuit Courts of Appeal and elucidate the proper standard for equitable relief from judgment in the federal courts. This Court should not pass up such an opportunity to mend a rift in the decisional law that has existed for many years.

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[37] *Id.*, citing *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982).

[38] *In re Murchison* (1955) 349 U.S. 133, 137, 75 S.Ct. 623, 625.

III. Either Federal Test Warrants Relief from Judgment for CBG.

The facts of the instant case meet both standards for equitable relief based on fraud listed above. In *CBUSA v. Currier & CBG*, the courts were defrauded by the falsely-sworn declarations of attorneys Michael Fish and Thomas Mauriello[39]. That fraud caused the court to issue an invalid emergency protective order ("EPO"). The EPO caused the San Francisco Sheriff's Department to evict Currier from CBUSA's offices, which were also CBG's office and Currier's home, as well as the domicile and location of both property and records, of corporations who have yet to appear in any case[40].

The purpose of the illegal eviction was to carry out Chow's plan to seize the assets (including both physical and intellectual property) of CBUSA, CBG, Currier, and other corporations run by Currier through an intentional fraud on the San Francisco Superior Court. The fraud on the court was intended to, and did, give Chow, Fish, Mauriello, and their co-conspirators the opportunity to seize the aforementioned assets and keep CBG, CBUSA, and Currier, out of competition in the global telecommunications market.

Therefore, in the instant case, officers of the Court (Fish and Mauriello) intentionally defrauded

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[39] Appendix, at Vol. I, 38a-39a, Vol. II, 61a.

[40] Appendix, at Vol. I, 34a, 37a-39a; Vol. II, 61a.

the court, and that fraud defiled the court by causing the court to issue an unjust EPO based on fraud. The enforcement of the EPO caused CBG and Currier, as well as Currier's other corporate entities, and the directors and shareholders of CBUSA, to suffer a manifest and harsh injustice. That is all that is needed to satisfy the Fourth or Ninth Circuit's test - a fraud on the court that defiles the court or was committed by an officer of the court.

The Sixth Circuit's test is also satisfied here. Officers of the court, Chow's attorneys, committed the fraud, which satisfies the first element. The fraud was intended to cause a court to issue an unjust EPO based on lies the attorneys presented as true facts. Thus, the "judicial machinery" is the object of the fraud, and the second element is satisfied. Chow's attorneys knew that some of the statements they made during the litigation of *CBUSA v. Currier & CBG* were false (e.g., Mauriello's statement that he had met Currier prior to service of the EPO when he had not). Chow's attorneys made other statements during the *Chow v. Currier & CBG* litigation with knowledge of their falsity, with willful blindness to the truth, or with total reckless disregard for their truth or falsity. For example, the trial judge who ruled on Chow's claims against Currier in *Chow v. Currier & CBG* found that Chow's claims were "revisionist" history and were utterly devoid of merit[41]. Thus, the third element of the Sixth Circuit test is satisfied. Since the statements to the court were presented in court pleadings and

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[41] *Statement of Decision*, Appendix 17a-18a.

testimony, the statements were positive averments or concealment of facts the attorneys were duty-bound to disclose. That satisfies the test's fourth element. The Court in *CBUSA v. Currier & CBG* issued the EPO and a later temporary restraining order based upon the false testimony, so the fifth element of the test, the court's actually being deceived, is satisfied.

Furthermore, CBG's *own attorneys* committed fraud that denied it a fair trial! Ricardo C. Saria ("Saria"), an attorney Currier hired to represent him and CBG, utterly failed even to appear on CBG's behalf. That failure resulted in the entry of default against CBG that gave rise to the motion to vacate the default, the subsequent appeal, and this petition[42]. It is clear that fraud need not be committed by an adverse party, nor does the fraud have to benefit the adverse party. For example, a party's own attorney's fraud against that party will support that party's motion for relief from judgment[43]. Saria's fraud was obviously intended to wrest a retainer fee from Currier, a fee which Saria never intended to earn through competent legal work.

Even before Saria's fraud on CBG, CBG's original corporate counsel, Vincent Spohn, committed fraud

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[42]Appendix, Vol. I, 24a; Vol. II, 47a, 58a, 59a, 66a, 75a.

[43]*Moore's Fed. Practice*, supra, RELIEF FROM JUDGMENT OR ORDER, at §60.21[4][e], pp. 60-59 - 60-60, citing *Alexander v. Robertson* 882 F.2d 421, 424 (9th Cir. 1989), and *Southerland v. County of Oakland*, 77 F.R.D. 727, 732-733 (E.D. Mich. 1978), *aff'd sub nom. Southerland v. Irons* 628 F.2d 978, 980 (6th Cir. 1980); *U.S. v. Throckmorton* (1878) 98 U.S. 61, 66.

against CBG when Spohn accepted responsibility as corporate counsel for both CBUSA and CBG. Then Spohn refused to defend CBG and Currier from Chow's frivolous lawsuits, and in fact testified against Currier at trial in *Chow v. Currier & CBG*[44]. According to *Throckmorton*, a case where an attorney "corruptly sells out his client's interest to the other side" is one where the judgment can be vacated, even after many years have passed since the entry of the judgment.[45]

All of the above factors entitle CBG to relief, despite the roughly two-and-a-half years that passed between the entry of the default judgment against CBG and its motion for relief from default. The *Hazel-Atlas* case made it clear that there is no time limit for the vacation of a judgment on the basis of fraud[46]. In fact, *Hazel-Atlas* involved the vacation of a twelve-year-old judgment[47].

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[44]Appendix, at Vol I., 34a, 35a, 38a, 39a, 42a; Vol. II, 47a, 57a, 58a, 65a, 66a, 75a, 79a-81a, 88a-90a. .

[45]*U.S. v. Throckmorton* (1878) 98 U.S. 61, 66.

[46]*Hazel-Atlas Glass Co.*, supra, 322 U.S. 238, 251, 64 S.Ct. 997; see also, e.g., *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2nd Cir. 1972) ["[N]o time limit is specified" for relief based on fraud on the court]; *Valerio v. Boise-Cascade Co.*, 80 F.R.D. 626, 640, n. 10 (N.D. Cal. 1978), *aff'd per curiam*, 645 F.2d 699, 700 (9th Cir. 1981) ["There is no statute of limitations for fraud on the court."]

[47]*Hazel-Atlas*, supra, 322 U.S. 238, 251.

IV. This Court Should Overrule the California Court Of Appeal's Erroneous Interpretation of *Throckmorton*, the Due Process Clause, and Basic Agency Principles So Other Litigants Will Not Suffer From That Court's, and the Trial Court's, Misunderstanding of the Law.

This Court, in its *U.S. v. Throckmorton* decision, stated:

> "But there is an admitted exception to this general rule [of the finality of judgments] in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of a suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, – these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or

decree, and open the case for a new and fair hearing[48]."

The decision of the California Court of Appeal, First Appellate District, Division Five conflicts with *Throckmorton*, supra, which is based on centuries-old equitable principles, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments. This is clear from the facts and law cited above. The Court of Appeal's own opinion clearly illustrates why.

As stated above, the California Court of Appeal rested its decision to uphold Judge Quidachay's decision to deny CBG equitable relief from judgment was based on two errors of law. First of all, the Court of Appeal found that CBG had to show not only a meritorious defense, but a defense that was absolutely guaranteed to prevail. That is not necessary under California or federal law; it is necessary simply to show allegations that would be valid defenses if proven at trial[49].

As the California Court of Appeal for the Fourth District stated in *Conforti v. Dunmeyer* :

"It is enough if the complaint [in an action to set aside a judgment] presents facts from which it can be ascertained that the plaintiff has a

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[48]*U.S. v. Throckmorton* (1878) 98 U.S. 61, 65-66.

[49]See, for example, these cases that interpret Fed.R.Civ.P. 60(b), which concerns motions for relief from judgment in federal courts on substantially the same grounds as motions directed at a court's equitable power, *Local 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992); *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983); *Tozer v. Charles A. Krause Milling Co.* 189 F.2d 242, 244 (3d Cir. 1951).

sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding.[50]"

A judge's statement of decision, after trial in favor of the only human being accused of acting on behalf of a corporation for the same causes of action asserted against the corporation, stating that the causes of action are completely devoid of merit, is extremely strong, if not compelling, evidence that the case against the corporation is also devoid of merit, and that the judgment should be reversed. The Court of Appeal misapplied the standard for relief from judgment here.

Conforti is particularly appropriate here, because it involved an action in equity by a mentally incompetent person, through her guardian. The incompetent plaintiff could not defend herself in court in an underlying foreclosure action because she was mentally ill, and thus, unable to look after her own interests. The *Conforti* court held :

"While in this action there is no allegation of any fraud on the part of the respondents in the conduct of the foreclosure action such as the respondent knew that the appellant was incompetent, as in the *Dei Tos* case[51] ... the fact that there is no fraudulent design makes no difference in that the principle of the law involved is that "... through no fault of his the defendant was not permitted to participate in the

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[50]209 Cal.App.2d 41, 44, quoting *Olivera v. Grace* (1942) 19 Cal.2d 570, 579.

[51]*Dei Tos v. Dei Tos*, (1951) 105 Cal.App.2d 81, 84.

proceedings." [Citations omitted] Incompetent defendants are entitled to relief in equity such as are characterized as extrinsic mistake."

Similarly, in *Hoversten v. Superior Court*[52], the California Court of Appeal for the Second District ordered a California Superior Court to consider the options it listed to allow a prisoner visitation with his children, and overturned that trial court's earlier orders which denied him visitation rights. Hoversten's earlier attempts to vacate or modify those visitation orders were stymied by Hoversten's incarceration. The *Hoversten* court noted that "Prison walls are a powerful restraint on a litigant wishing to appear in a civil proceeding[53]."

Similarly, the rule against corporate self-representation is a very powerful restraint on an indigent corporation wishing to appear in a civil proceeding. There is no reason why a corporation that faces an insurmountable financial and legal barrier should be denied relief when such relief is granted to a prisoner that faces a similar physical and legal barrier.

A ruling from this Court on the subject of economic oppression as grounds for equitable relief from judgment would resolve the split of opinion between this California Court of Appeals decision and other California decisions such as the

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[52] *Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 643-644.

[53] *Id.*, at 640.

Hoversten decision, and alert all state and federal courts, as to whether a economic and legal impediments that keep a party out of court completely qualify as a sufficient excuse for the failure to defend the initial court action under *Throckmorton*. All state and federal courts essentially follow *Throckmorton,* so a decision in this case would provide guidance to every court in the land and affect many cases.

In the instant case, much as in *Dei Tos*, Chow knew of CBG's legal and financial disability that kept CBG out of court *because they created the disability*!

Similarly, the Court of Appeal appears to have willfully ignored Currier's complaints about Saria, his incompetent legal counsel , by stating that Currier should have had Saria move to vacate the default judgment against CBG! Currier stated that Saria committed positive misconduct by failing to appear on behalf of CBG, and then failed to obtain relief from default on CBG's behalf. In fact, Currier obtained a $700,000.00 judgment against Saria for legal malpractice[54].

The Court of Appeals also dismissively stated, as noted above, that CBG failed to analyze the causes of action in the complaints, the causes of action tried, Currier and CBG's relationship, and potential res judicata and collateral estoppel issues[55]. That statement is not only patently

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[54]Appendix, Vol. I, 27a .

[55]Appendix, Vol. II, 66a.

false[56], is completely ignores the legal principle that "If the action is solely based upon the tortious conduct of the agent, judgments on the merits for the agent and against the principal, or judgments for varying amounts of compensatory damages, are erroneous[57]." The Court of Appeals also denied CBG's motion to augment the record on appeal with the reporters' transcript from the trial in *Chow v. Currier & CBG* with the excerpts of record that conclusively show all causes of action stated against CBG were either dismissed outright at the beginning of trial, or dismissed after the hearing of the evidence against Currier, the only CBG agent accused of any wrongdoing. All the causes of action against Currier except defamation were dismissed, and CBG was not a defendant to Chow's defamation cause of action[58].

This court has previously disapproved of legal maneuvering that allowed the person who ran a "one man" or "family" corporation to fraudulently escape judgment in *Pepper v. Litton*[59], where this

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[56]Appendix, Vol, I., 36a, Vol. II, 71a, n. 105..

[57]*Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1423, citing Rest.2d Agency, §217 B, p. 472 [Ironically, *Lathrop* is the First District, Division Five's own opinion.]; see also *Bradley v. Rosenthal* (1908) 154 Cal. 420, 425 -427; *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347.

[58]See Motion for Reconsideration, Reply in Support of Motion to Augment Record, Appendix, Vol II, 83a, 84a, 87a, 92a.

[59](1939) 308 U.S. 295, 296-297, 301. The instant case also involved a bankruptcy fraud intended to enrich insiders at the expense of legitimate creditors, as noted in the Statement of the Case, *supra*.

Court overturned the Fourth Circuit's overruling of a bankruptcy court's decision to subordinate the wage claim of a corporate director to that of an outside creditor with a valid claim. The Court's decision was based on the fact that the director's claim was obviously fraudulent and intended to ensure that the corporation would have no assets with which to satisfy subsequent, valid claims against the corporation. As this Court noted, the equitable powers of the court "have been invoked to the end that fraud will not prevail, that substance will not give way to form, [and] that technical considerations will not prevent substantial justice from being done[60]." In *Pepper*, this Court refused to allow a "one man" corporation shield its one controlling shareholder from liability for fraud, since Litton's actions controlled the corporation. Petitioner asks that in this case, CBG, a corporation with only one active agent[61], Currier, not be held liable for actions Currier did not take, since Currier controlled CBG's actions. To allow the current judgment to stand is to allow form and procedure to trump actual justice, and to provide future practitioners of fraud a pattern with which to use the legal system to steal the assets of a corporation. Neither result is the aim of the American legal system.

The legal reasoning that underlies the California Court of Appeal's, and the trial court's decision in this case is erroneous. That faulty logic by the

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[60] *Id.*, 308 U.S. 295, at 305.

[61] The only other agent of CBG, director Ordell Conrad, was not accused of any wrongdoing in the complaints in 323391 or 323394.

California Court of Appeal presents a substantial risk of inconsistent judgments against corporations where their agents were found not liable in future cases.

To allow the decision to stand is to allow wrongdoer to take an inequitable judgment against a corporation with only one human officer, agent, or director, even where that natural person is exonerated of all liability, simply because the corporation and natural person did not possess the funds to hire a lawyer for the corporation. It would allow such judgments to stand *even when the reason the corporation had no funds to pay an attorney is because the party suing the corporation stole the corporation's assets!* This Court can and should overturn the California Court of appeal, so that justice may actually be done here, and in similar cases in the future.

CONCLUSION

For the reasons stated above, this Court should grant CBG's petition for a writ of certiorari to the California Court of Appeal, First District, Division Five.

Respectfully submitted,
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October 6, 2006 By: _____

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